NOS. 88-2049, 88-2052

Supreme Court, U.S.
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In the Supreme Court of the United States
October Term, 1988

EMPLOYERS INSURANCE OF WAUSAU, *ET AL.*
Petitioners

VERSUS

AVONDALE SHIPYARDS, INC., *ET AL.*
Respondents

OCCIDENTAL PETROLEUM CORPORATION, *ET AL.*
Petitioners

VERSUS

AVONDALE SHIPYARDS, INC., *ET AL.*
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITION

ELI ELLIS*
TERENCE GARGAN
JOHN J. TOMASELLI
JOHN F. KEATING
Hill, Betts & Nash
One World Trade Center
New York, New York 10048
(212) 839-7000

NORMAN C. SULLIVAN, JR.
Gelpi, Sullivan, Carroll & Laborde
430 Notre Dame Street
New Orleans, Louisiana 70130
(504) 524-9714

Attorneys for Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping Incorporated

*Counsel of Record

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SUMMARY OF ARGUMENT

The brief of Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping Incorporated (collectively "Hvide")[1] in opposition to the Petitions for a Writ of Certiorari addresses only those questions raised in the Petitions relating to Hvide, specifically questions C and D of the Petition filed by Charles Lugenbuhl on behalf of Employers Insurance of Wausau, as Representative of Those Certain American Underwriters Subscribing to Certificate No. 14880 (Case Number 88-2049) and question 1 of the Petition filed by James B. Kemp, Jr. on behalf of Occidental Petroleum Corporation and the London Underwriters, *et al.* (Case Number 88-2052).

The Fifth Circuit's decision is consistent with the precedents of this Court and the decisions of other trial

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[1] The following information is provided pursuant to Supreme Court Rule 28.1 regarding respondents:

Hvide Shipping, Incorporated
Hvide Marine International, Inc.
Hvide Marine Transport Incorporated
Seabulk Corporation
Seabulk Tankers, Ltd.
Seabulk Chemical Carriers, Inc.
Seabulk Transmarine I, Inc.
Seabulk Transmarine II, Inc.
Seabulk Transmarine III, Inc.

and appellate courts of the United States. Pursuant to the trend highlighted by this Court's decision in *East River Steamship Corporation v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295 (1986), Hvide, as a party intimately involved in the manufacture of the vessel OXY PRODUCER, cannot be held liable in tort; the sole remedies against Hvide are those provided by way of breach of contract. The contract was negotiated at arms length between parties of equal bargaining power and substantial business and legal acumen. No reason exists for this Court to rewrite that contract.

Hvide adequately raised its defenses at the district court level. Even if it had not, the issue at bar is a question of law central to the decision of the appellate court and premised upon the *East River* decision, which was decided after the initial trial proceedings.

The Fifth Circuit's decision merits no further review.

ARGUMENT

A. Hvide's Performance as Supervisor of the Manufacturing Process Cannot Be Divorced From That Process.

Any attempt to distinguish Hvide's performance in the manufacturing process from the process itself is contrary to logic, good sense and *East River*. *East River* did not open the floodgates as Petitioners contend, but rather served as a dike to re-establish the proper segregation of the sea of tort from the land of contract. Petitioners now ask this court to assume the position of the little Dutch boy while Petitioners poke holes in the *East River* dike based upon artificial distinctions that will flood the courts with litigation over which actions are supervisory and which are related to manufacturing. Petitioners' holes will quickly outnumber the fingers available to the courts for holding back the recently dammed flood waters of tort.

The paucity of authority relied upon by Petitioners speaks for itself. Petitioners' sole recent citation[2] is a

[2] The several cases cited only by Petitioner Occidental Petroleum Corporation for the principle that a contract including the provision of services "may be exempted from the purview of *East River*", Petition of Occidental Petroleum Corporation, p. 9, cannot possibly stand for that principle as each case cited was decided prior to *East River*. In

pre-*East River* decision by a district court in New York, *Consolidated Edison Company of New York, Inc. v. Westinghouse Electric Corporation*, 567 F. Supp. 358 (S.D.N.Y. 1983). On careful examination, however, *Con Ed* does not support Petitioners's position and, to the extent that it may be read to provide such support, can no longer be viable after *East River*.

In *Con Ed*, the allegations of negligence against Westinghouse were twofold: First, it was claimed that Westinghouse was negligent in furnishing defective turbines, just as it is here claimed that Hvide and Avondale were negligent in furnishing a defective vessel. *Con Ed's* second set of negligence causes of action alleged negligent failure to warn of defects in equipment supplied to *other* customers, negligent failure to compile

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addition, the cases are inapposite on their facts and holdings: *LaRossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968), a wrongful death case, held a tort cause of action will *not* lie; *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979) held a claim for strict liability against a party who provided services would *not* lie and, in any event, if this decision could in any way be interpreted as conflicting with the case at bar, it must be considered overruled by the Fifth Circuit's present decision; *Pepsi Cola Bottling Co. v. Superior Burner Service Co., Inc.*, 427 P.2d 833 (Alaska 1967) involved an unchallenged tort cause of action and upheld a lower court's decision to preclude instructions on breach of contract; *Rosos Litho Supply Corp. v. Hansen*, 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984) is an intermediate level Illinois court decision that arguably supports Petitioners' position but reads narrowly and appears to conflict with the leading Illinois Supreme Court decision, *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (Ill. 1982).

test data and negligent delay in advising Con Ed of problems revealed by the test data.

The New York court properly dismissed the first claim:

> As to Con Ed's claims concerning defective equipment and improper operating instructions, that portion of Con Ed's complaint must be dismissed for the reasons just stated: claims concerning defects in a product which have simply deprived the purchaser of the benefit of its bargain do not state a cause of action in negligence.

567 F. Supp. at 365-366.

In a footnote the court added:

> Although an argument can be made that the provision of operating instructions constitutes a service separate from the supplying of the equipment, we find the distinction artificial and conclude that Con Ed's claims concerning the operating instructions, insofar as they are based on a negligence theory, are subject to dismissal as part of Con Ed's claims concerning defective equipment.

567 F. Supp. at 366, n. 11.

In the present case any distinction between Hvide's direct supervision of the manufacturing process and Avondale's performance of the process is equally artificial. It is easy, in a sterile legal environment, to be caught up in the talismanic language of "provision of services". As is clear from the record, however, and as

was required by the Supervision Agreement, Hvide was intimately involved in the day to day operations at the shipyard during the manufacture of the vessel and its role cannot be divorced from the manufacturing process. Petitioners themselves admit Hvide was selected because of its "particular expertise concerning the design, *construction* and operation of catugs". Petition of Employers of Wausau, p. 22 (emphasis supplied).

The second group of negligence claims in *Con Ed* was severed from the contract by the New York district court and allowed to stand in tort. This portion of the decision, however, does not affect the correctness of the Fifth Circuit's ruling on the causes of action against Hvide. First, *Con Ed* would likely be decided differently today given the current state of the law in New York, discussed *infra*. Second, the claim against Hvide does not allege separate duties outside of the manufacturing process, but only alleges negligent performance of the duties specified within the four corners of the agreement. There is no allegation, as there was in *Con Ed*, of failure to warn of defects in vessels manufactured under Hvide's supervision for other customers, for example. Nor there is any allegation that Hvide negligently undertook to conduct tests and compile data *after* the manufacture of the vessel was completed. Thus, the New York court's

ruling on the second set of negligence claims is inapposite here.

Third, even if the New York court's decision was on point, this latter portion of its decision could not stand after *East River*. In *East River*, this Court had the opportunity the use a *Con Ed*-like judicial scalpel in carving out tort and contract liability on East River Steamship's fifth count. This Court refused to do so, however, even where the basis of the negligence count was the failure of the defendant properly to supervise the installation of a component part, a part that was manufactured elsewhere and installed by another party. Unlike Hvide, the *East River* defendant had no connection whatsoever with the manufacture of the component, not even in a supervisory capacity. This Court nonetheless dismissed the negligence claim and supported its ruling with a citation to a decision specifically rejecting the notion that services and manufacture can be separated when the services are integrally related to and inextricably intertwined with the manufacturing process of the ultimate product, *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942 (11th Cir. 1982). The *Flintkote* court reasoned:

> We are especially reluctant to make an exception to the [economic loss] rule where the exercise of professional skills occurred only

> in the process of manufacturing or constructing a product. To do so would effectively eviscerate the economic loss rule by permitting parties suffering economic losses to sue for the benefit of their bargain in tort by merely alleging, as does appellant here, that a party to the manufacture or construction of a defective good negligently performed some "professional" task.

678 F.2d at 950.

Even if underwriters are correct that a line should be drawn between a manufacturer and one who provides purely professional services totally unrelated to the manufacturing process,[3] that line cannot be drawn here. On the facts of this case, Petitioners contention would require the courts to become involved in distinctions based upon the type of tool involved. Here, the district court found that Hvide's employee, Robert Bibbo, personally measured the space between the barge and tug greenheart surfaces during the manufacture of the vessel. Thus Bibbo's ruler would have to be designated supervisory while a welding rod used by a shipyard worker would be of a manufacturing nature. Presumably

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[3] As noted by the Fifth Circuit, even those cases involving straightforward provision of professional services totally unrelated to any manufacturing process are somewhat vague as to the rationale for permitting a tort cause of action for negligent performance of a contract. The *East River* decision may well demonstrate that such causes of action are outmoded legal theories in search of a logical and rational basis.

Bibbo's ruler would become a manufacturing tool had it had been wielded by an Avondale shipyard employee with Bibbo merely observing the measurements.

Such fine distinctions serve no purpose in the larger scheme of determining the bounds of tort law. This court has clearly set forth those bounds in *East River.* The Fifth Circuit's decision is fully in accord with and follows the rationale and spirit of the *East River* decision. While Petitioners can cite no authority in support of breaking down the dikes, the courts that have considered like questions since *East River* have embraced this Court's clear distinction between tort and contract remedies. In fact, New York's highest court has repudiated the practice of alleging lack of due care in the performance of a contract as a separate tort cause of action. "It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty *independent of the contract itself* has been violated", *Clark-Fitzpatrick, Inc. v. Long Island Rail Road,* 521 N.Y.S.2d 653, 656 (N.Y. 1987)(emphasis supplied). No such independent duty has ever been alleged, much less proven, in this case.

Even if such a duty were found, the clear trend is to prohibit recovery for mere economic loss in tort when a contract remedy exists. *See Alcoa Coal Company v. Clark*

Equipment Co., 816 F.2d 110 (3d Cir. 1987); *Learjet Corporation v. Spenlinhauer,* 707 F. Supp. 44, 47 n. 2 (D. Me. 1989). At least one jurisdiction has extended the economic loss rule to all cases involving contracts, without regard to the superficially appealing, but baseless "service v. manufacturing" distinction, on the theory that the law of contracts is meant to facilitate voluntary economic exchange. *Carmania Corp., N.V. v. Hambrecht Terrell International,* 705 F. Supp. 936 (S.D.N.Y. 1986)(allegations of negligent performance of architect dismissed). The concept that parties of equal bargaining power should be left to the benefit of their bargain, whether that bargain be for sales or service, is clearly the predominant view. Thus, the Fifth Circuit's decision here is consistent with existing law and merits no further review.

B. Occidental Needs No Special Protection In Their Contractual Dealings.

The parties to the Occidental - Hvide Supervision Agreement are precisely the parties of equal bargaining strength envisioned by the legions of decisions supporting contractual integrity. Petitioners argue that Occidental Petroleum Corporation is extremely unsophisticated with regard to shipbuilding. Occidental's longstanding and

extensive involvement with vessels belies this claim, but sophistication with regard to shipbuilding is hardly the issue here. The concept of equality in bargaining power has never been dependent on equality in professional knowledge. In fact, one can assume that if one had sufficient professional knowledge and expertise in a given area, one would not have found it necessary to contract for another's services in the first place.

What is relevant is the economic and business sophistication of the parties. If a contract is formed between two parties who deal in a commercial setting from positions of relatively equal bargaining strength and who bargain and negotiate concerning the specifications of the product being manufactured and the risk of loss arising from defects in manufacturing, no special protection by the courts is warranted. *S.M. Wilson & Company v. Smith International, Inc.*, 587 F.2d 1363, 1366-1367 (9th Cir. 1978). In *East River*, for example, East River Steamship Corporation no doubt had extensive experience in operating steam turbine propelled vessels. Nothing in the reported facts, however, gives any indication that they were the professional equal of Transamerica Delaval when it came to designing and manufacturing turbines. Nonetheless, as both were equals from the standpoint of economic power and

bargaining strength, this Court saw "no reason to intrude into the parties' allocation of risk". 106 S.Ct. at 2303.

In the present case the allocation of risk was obviously considered by the parties, negotiated carefully and, in specific language, spelled out in the Supervision Agreement and Insurance Letter Agreement. While the precise meaning of the terms of those agreements has been litigated below and still remains to be litigated in the damages trial of this case, there can be no question that Occidental and Hvide included terms in their bargain that each party thought beneficial with regard to allocation of risks in the event of a defect in the manufacture of the OXY PRODUCER. Petitioners' argument that lack of U.C.C. remedies should defeat the application of *East River* is put to rest by this very bargaining process: parties such as Occidental Petroleum Corporation are more than capable of incorporating not only U.C.C. warranties, but any other allocations of risk they can negotiate into their contracts.[4] Given the arms length negotiation of these agreements, this Court need not step in to provide relief to Occidental Petroleum

[4] The statement in the Petition of Occidental Petroleum Corporation, p. 9, n. 5, that Occidental retained its U.C.C. remedies against Hvide is totally unsupported by any evidence in the record.

Corporation from the consequences of its business dealings.

C. No Damage to "Other Property" Exists.

Contrary to the assertions of Petitioners, no damage to "other property" was sustained in the sinking of the OXY PRODUCER. Petitioners assert that a loss of crew effects will be shown at the damages trial. What Petitioners neglect to mention is that the crew effects, which do not constitute "other property" in any event, were paid for by the crew's employer, Hvide, and not by Petitioners.

It is well established that the loss of property incidental to the failure of a product, when that property is closely associated with the product, does not constitute "other property". *Chicago Heights Venture v. Dynamite Nobel of America, Inc.*, 782 F.2d 723 (7th Cir. 1986)(damage to ceilings, floors and bricks not "other property" when defective roof installed); *Purvis v. Consolidated Energy Products Company*, 674 F.2d 217 (4th Cir. 1982)(damage to tobacco crop not "other damage" when defective curing barn ventilating system installed); *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902 (D. Minn. 1985)(injury to feed and to cows not "other property" when defective feed system installed). The miscellaneous

effects of the crew, like the many other bits of equipment on a vessel, are likewise not "other property" for purposes of establishing tort liability.

Moreover, what losses the crew sustained, contrary to Occidental's assertions, were paid by Hvide. Occidental cannot claim losses of a third party, or losses of Hvide as justification for a departure from its contractual bargain. *See Colonial Park Country Club v. Joan of Ark*, 746 F. 2d 1425 (10th Cir. 1984)(the existence of one party's tort claim does not permit every other contract claim to be raised in tort).

Finally, the losses at issue are *de minimis.* The total amount of the crew's claim was approximately $32,000. These claims were paid by Hvide as the employer of the crew. Approximately $28,000 was reimbursed by Hvide's Protection and Indemnity ("P&I") underwriters, who are not parties to this litigation. The remaining $4,000 was borne by Hvide. Even if Petitioners had borne this $4,000 cost, the amount is clearly *de minimis*, if not legally insignificant, when compared to the $70 million claim of Petitioners.

D. Hvide did not Waive Any Defenses at the District Court.

Petitioners label Hvide's defense, that its only liability is pursuant to contract, as a defense of failure to state a claim. Petitioners then conclude that since Hvide did not espouse an *East River* economic loss rule at the District Court, plaintiffs had inadequate notice of the defense, have been prejudiced and thus Hvide must be held to have waived the defense.

From the outset of the litigation Petitioners claimed Hvide breached its supervision contract and negligently performed its professional services. Hvide pleaded a defense of failure to state a claim in its answer and has maintained throughout the litigation that it could not be liable in tort.

Petitioners argue that Hvide's general statement in its answer that the complaint failed to state a claim upon which relief could be granted was insufficient to raise the defense. However, this defense is not waived for failure to assert it in a specific manner. *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984). As long as Hvide raised in the trial court the broad or general defense that the complaint failed to state a claim for which relief could be granted, the issue is properly before

the appellate court. *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982).

Even if it is determined that Hvide did not adequately raise the defense in the district court, Hvide is still not barred from raising the issue on appeal since *East River*, the decision which established the defense, was decided subsequent to the trial on the merits. In *Cotton States Mutual Insurance Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984), the appellate court recognized that the appellee did not raise a particular defense at the trial level, but also recognized that appellee was unable to do so because the decision on which the defense was premised had not yet been issued. The appellate court held that a defense is not waived by failure to raise the issue at trial in such circumstances. 749 F.2d *at* 665.

Finally, prior to the Fifth Circuit's decision in this case, the matter was remanded to the district court for reconsideration in light of *East River*. Petitioners litigated the issue and convinced the district court that *East River* was not applicable. That they were not equally successful on appeal does not provide a basis to claim prejudice.

Even had Hvide not raised the defense at the district court, however, an appellate court may nonetheless consider an issue raised for the first time on appeal where the issue is an issue of law, is central to the

decision at hand or where refusal to consider the issue would result in a manifest injustice. *Escobar Ruiz v. Immigration and Naturalization Service*, 813 F.2d 283 (9th Cir. 1987); *FMC Finance Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980). The question presented by Hvide at the Fifth Circuit was a question of law and, Hvide submits, has already been answered by this Court. The question was clearly central to this case and failure to consider the issue would certainly have resulted in manifest injustice.

Petitioners, in asserting that Hvide waived the defense, seek to wave a procedural smoke screen before the well settled principal that a court, including an appellate court, must apply the law as it exists at the time of its decision and not the law as it existed at the time the complaint was filed or the trial held. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974); *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir. 1983) (applying an intervening decision of the Mississippi Supreme court). Where a decision of the United States Supreme Court demonstrates that a ruling on which a judgment depends was in error, a court of appeals is required to correct that ruling. *Crane v. American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979).

Here, the *East River* decision abolished the cause of action upon which Petitioners' negligence claims are

based. Even had Hvide not previously litigated the existence of these claims, this Court has already established that no such cause of action exists.

CONCLUSION

For the reasons above stated, the decision of the United States Court of Appeals for the Fifth Circuit is consistent with federal maritime law as set forth in the decisions of this Court. No conflict between appellate courts exists on any of the issues raised by Petitioners. The Petition must be denied.

Respectfully submitted,

ELI ELLIS
TERENCE GARGAN
JOHN J. TOMASELLI
JOHN F. KEATING
Hill, Betts & Nash
One World Trade Center
New York, New York 10048
(212) 839-7000

NORMAN C. SULLIVAN, JR.
Gelpi, Sullivan, Carroll
& Laborde
430 Notre Dame Street
New Orleans, Louisiana 70130

Attorneys for Respondents